

Court of Appeals No. 48627-0-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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DIVISION II  
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STATE OF WASHINGTON  
BY ~~DEPUTY~~

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DONALD RUTHERFORD, an individual and  
ROBERTA CRAWFORD, an individual,

Appellants.

vs

IBEW HEALTH & WELFARE TRUST OF  
SOUTHWEST WASHINGTON,

Respondent.

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**BRIEF OF APPELLANTS**

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## **I. INTRODUCTION**

This Court should reverse the Trial Court's entry of default judgment against the Appellants, Donald Rutherford and Roberta Crawford, (collectively referred to herein as "Appellants"). Plainly, federal law expressly preempts state law subject matter jurisdiction over the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA") claim brought by Plaintiff, IBEW Health and Welfare Trust of Southwest Washington, (hereinafter "IBEW").

IBEW initiated litigation against the Appellants on July 31, 2013. The Trial Court record indicates that the Appellants were served with the suit on August 30, 2013. Thereafter, IBEW moved for, and obtained, a Default Judgment against the Appellants. Approximately, one year after entry of the Default Judgment, the Appellants successfully vacated IBEW's Judgment. The Appellants thereafter moved to dismiss IBEW's complaint alleging, *inter alia*, lack of subject matter jurisdiction over IBEW's ERISA claim. The Trial Court denied the Appellant's motion, and instead, reinstituted the Default Judgment. Commensurate with reentry of the Default Judgment, the Trial Court also opined it held subject matter jurisdiction.

Plaintiff's Complaint alleged one cause of action under 29 U.S.C. § 1132(a)(3). However, 29 U.S.C. 1144 generally, and 29 U.S.C. § 1132(e) specifically, preempt state jurisdiction and instead, confer

exclusive federal jurisdiction over claims brought pursuant to 29 U.S.C. § 1132(a)(3). Furthermore, IBEW failed to plead with particularity, as required by the civil rules, any fraud claim which IBEW later argued.

## **II. ASSIGNMENTS OF ERROR**

### **Assignments of Error**

1. The trial court below erred by failing to address and dismiss IBEW's Complaint upon the Appellants' Motion to Dismiss for lack of subject matter jurisdiction where the Plaintiff sought relief pursuant to 29 U.S.C. § 1132(a)(3) yet 29 U.S.C. § 1132(e) expressly vests subject matter jurisdiction in federal courts for claims brought as pled by IBEW.

2. In the alternative, the trial court below erred by failing to address and dismiss IBEW's Complaint where IBEW alleged it sought relief pursuant to a state common law fraud cause of action yet IBEW failed to comply with the heightened pleading requirements for fraud claims and sought relief pursuant to federal law.

3. The trial court erred by awarding attorneys' fees to the IBEW pursuant to 29 U.S.C. § 1132(g) upon entry of IBEW's default judgment.

4. The trial court erred by granting damages to IBEW outside of the applicable statute of limitations.

### **Issues Pertaining to Assignments of Error**

1. Under 29 U.S.C. § 1132(e), which expressly preempts state court adjudication of claims brought pursuant to 29 U.S.C. § 1132(a)(3), does a

state trial court, like the Pierce County Superior Court, lack subject matter jurisdiction to hear and decide a cause of action brought pursuant to 29 U.S.C. § 1132(a)(3) when the plain language of. *Answer: Yes*

2. Under the Civil Rules, which require heightened pleading requirements for fraud claims, does a trial court err when it fails to dismiss a Plaintiff's Complaint, when the Complaint fails to plead fraud with particularity and, apparently, sets for a cause of action under federal law, not state law. *Answer: Yes*

3. Under Federal Supreme Court Jurisprudence, which holds a trial court may grant attorneys' fees pursuant to 29 U.S.C. § 1132(g) only upon success on the merits, does a trial court err when it awards attorneys' fees pursuant to 29 U.S.C. § 1132(g) upon entry of default judgment. *Answer: Yes*

4. Under ERISA, which borrows the state statute of limitations - RCW 4.16.040 – does a trial court err when it awards damages for claims that accrued outside of the statute of limitations. *Answer: Yes*

### **III. STATEMENT OF THE CASE**

Plaintiff, IBEW initiated litigation on July 31, 2013. Clerk's Papers (hereinafter "CP") at 1-5. IBEW's Complaint (hereinafter "Complaint") alleges IBEW operates as an ERISA governed Taft-Hartley trust fund. CP at 1.

IBEW offers medical benefit coverage to Mr. Rutherford as an eligible member by virtue of his employment with Christensen Electric. CP at 2. In or around 2002, Mr. Rutherford inquired about health insurance coverage for his long-time partner, Ms. Crawford. *Id.* at 67. At that time, IBEW only extended benefits to an eligible member's spouse. Accordingly, Mr. Rutherford advised the plan administrator, Lee Hare, in 2002 that he and Ms. Crawford were in fact not married. *Id.* at 68. Nevertheless, Mr. Hare advised Mr. Rutherford that Ms. Crawford was eligible for benefits and enrolled Ms. Crawford for coverage. *Id.* at 67-68. Beginning in 2002, IBEW extended health benefits to Ms. Crawford. *Id.* at 80. The Appellants deny either Mr. Rutherford or Ms. Crawford represented to IBEW that the Appellants lived as a married couple. *Id.* at 68, 80.

In 2012, Mr. Mark Wheir assumed responsibility for the plan's administration. *Id.* After Mr. Wheir assumed management, IBEW conducted a "dependent verification process." *Id.* at 43. According to IBEW, the dependent verification process revealed, or, more accurately, confirmed, Mr. Crawford and Mr. Rutherford were not legally married. *Id.* at 43, 73. Indeed, as had done previously, Mr. Rutherford truthfully reiterated to IBEW that they were not married during a phone interview. *Id.* at 83. Because Mr. Rutherford and Ms. Crawford are not married,

IBEW terminated Ms. Crawford's coverage effective March 16, 2012. *Id.* at 68, 80.

However, after collecting the necessary documentation from Appellants, IBEW resumed Ms. Crawford's coverage approximately 3-months later. *Id.* at 69, 73, 80. Specifically, in June 2012, Mr. Wheir acknowledged receipt of IBEW's Affidavit of Domestic Partnership, and subsequently, Ms. Crawford's eligibility to participate in the plan. *Id.* at 73. Mr. Rutherford provided the affidavit at IBEW's request. *Id.* at 69.

Despite resuming coverage, IBEW filed the underlying Complaint on July 31, 2013. CP at 1. IBEW's Complaint alleged the Pierce County Superior Court obtained jurisdiction through the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1132(a)(3). CP at 2. IBEW's Complaint alleged proper venue in Pierce County Superior Court under 29 U.S.C. 1132(e)(2). *Id.* As a cause of action, IBEW alleged the following:

- 4.2. The above actions of the Defendants give rise to the level of fraud and/or serious wrongdoing and thus give rise to a restitution claim under 29 U.S.C. [sic] § 1132(a)(3).

*Id.* at 4.

The Appellants hired legal counsel to defend against IBEW's Complaint. *Id.* at 10. For reasons unknown to the Appellants, the

Appellants' legal counsel withdrew from representation. *Id.* at 13-14, 68, 81.

On April 1, 2014, IBEW moved for an Order of Default against Appellants. *Id.* at 16-24. On May 15, 2014, IBEW moved for and obtained a Default Judgment. *Id.* at 41, 50-51. In its motion and supporting declaration for default judgment, IBEW requested attorneys fees only pursuant to 29 U.S.C. § 502(g)(1). *Id.* at 44, 49.

IBEW began garnishment of Donald Rutherford's wages to satisfy the default judgment. *Id.* at 165-69. The Appellants moved to vacate IBEW's Default Judgment on May 18, 2015. *Id.* at 53-66. The Appellants alleged, *inter alia*, that the trial court lacked subject matter jurisdiction to hear and decide IBEW's claim pursuant to the plain language of 29 U.S.C. §1132. *Id.* at 58-59.

On June 19, the trial court granted the Appellants' Motion to Vacate. *Id.* at 139-40. The trial court did not indicate the basis upon which the trial court granted the Appellants' motion. *Id.* However, the trial court conditioned the Order to Vacate upon Appellants' payment of \$5,000.00 to IBEW within sixty days of the Order to Vacate. *Id.* at 140.

At the time the trial court entered the Order to Vacate, IBEW garnished approximately \$7,444.08 in Rutherford's wages. *Id.* at 169. IBEW did not return the garnished wages upon entry of the Order to

Vacate. *Id.* at 165-66. However, the Order to Vacate did not expressly order IBEW return the previously garnished wages. *Id.* at 139-40.

On January 13, 2016, the Defendants filed a motion requesting the trial to confirm their compliance with the Court's June 19 Order. *Id.* at 146-56. The Appellants argued below IBEW already held in excess of \$5,000.00 of Appellants' monies based on garnishments taken pursuant to the Default Judgment up and through the date of the Order to Vacate. *Id.* at 150-51.

Subsequently, on January 14, 2016, the Defendants also filed a Motion to Dismiss, again arguing, *inter alia*, this Court lacked subject matter jurisdiction over IBEW's ERISA claim. *Id.* at 170-78. The Appellants also argued IBEW failed to state a common law fraud claim. *Id.* at 223-25.

The trial court denied the Appellant's Motion to Dismiss. *Id.* at 241-243. The trial court's reinstatement of the Default Judgment rested upon the trial court's determination that the Appellants did not comply with the condition set in the trial court's June 19, 2015 Order. *Id.* In passing, the trial court determined it held subject matter jurisdiction. Verbatim Report of Proceeding 1/22/16 at 14:13-20. However, the trial court did not elaborate or state the basis on which the trial court held jurisdiction. *Id.*

The Appellants filed Notice of Appeal on January 26, 2015. CP at 246-47.

#### **IV. SUMMARY OF ARGUMENT**

The trial court erred by failing to dismiss IBEW's complaint. IBEW sought recovery in state court pursuant to ERISA, 29 U.S.C. § 1132(a)(3). 29 U.S.C. § 1132(e) expressly states federal courts maintain exclusive jurisdiction over claims brought pursuant to 29 U.S.C. § 1132. 29 U.S.C. § 1132(e) confers concurrent jurisdiction with state courts only for claims brought pursuant to 29 U.S.C. § 1132(a)(1)(B) and 29 U.S.C. § 1132(a)(7). Because IBEW sought recovery in state court under a cause of action expressly reserved to the federal courts, the trial court erred by failing to dismiss for lack of subject matter jurisdiction.

In the alternative, IBEW sought to save the action alleging it pled a cause of action for fraud. However, the Civil Rules impose heightened pleading requirements for fraud claims, including pleading the circumstances constituting fraud with particularity. *See* CR 9(b). However, IBEW failed to state generally, much less with particularity, the actions by the Appellants giving rise to a cause of action for fraud. Moreover, when read in its entirety, IBEW's Complaint strongly emphasizes recovery under ERISA, not Washington common law.

Because IBEW recovery pursuant to ERISA only, the trial court erred by failing to dismiss IBEW's complaint.

## V. ARGUMENT

The trial court failed to dismiss IBEW's claim. IBEW sought recovery, in state superior court, pursuant to ERISA subsection 29 U.S.C. § 1132. However, 29 U.S.C. § 1132 preempts and prevents claimants from bringing the cause of action brought by IBEW in state court. The trial court lacked subject matter jurisdiction; thus, the trial court erred by failing to dismiss the action. Further, IBEW failed to properly plead a common law fraud claim.

### A. Standard of Review.

This Court should apply a de novo standard of review below. Subject matter jurisdiction is a question of law reviewed de novo. *Young v. Clark*, 149 Wn.2d 130, 132, 65 P.3d 1192 (2003); *Evergreen Washington Healthcare Frontier LLC v. Dep't of Soc. & Health Servs.*, 171 Wn. App. 431, 444, 287 P.3d 40 (2012). Likewise, courts review issues regarding statutory construction de novo. *Evergreen Washington Healthcare*, 171 Wn. App. at 444.

### B. The Trial Court lacks subject matter jurisdiction to hear and decide IBEW's ERISA claim.

As pled, the Pierce County Superior Court (the "Trial Court") lacked subject matter jurisdiction. IBEW's complaint repeatedly referenced jurisdiction and relief pursuant to 29 U.S.C. § 1132. However,

29 U.S.C. § 1132(e) expressly reserves federal jurisdiction and preempts state court adjudication.

IBEW's Complaint states:

- 2.1 This Court has Jurisdiction *under § 502(a)(3) of the Employee Retirement Income Security Act (ERISA), codified at 29 U.S.C. § 1132(a)(3).*
- 2.2 Venue in this Court is proper *under §502(e)(2), ERISA, codified at 29 U.S.C. § 1132(e)(2).*
- ...
- 4.2 The above actions of the Defendants rise to the level of fraud and/or serious wrongdoing and thus *give rise to a restitution claim under 29 US.C. [sic] § 1132(a)(3).*

CP at 2, 4 (emphasis added).

However, 29 U.S.C. § 1132(e) expressly preempts IBEW's claim brought pursuant to 29 U.S.C. § 1132(a)(3).

The same statute pled by IBEW, 29 U.S.C. § 1132, provides:

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, *the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter* brought by the Secretary or by a participant, beneficiary, fiduciary, or any person referred to in section 1021(f)(1) of this title. *State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under paragraphs (1)(B) and (7) of subsection (a) of this section.*

(2) Where an action under this subchapter *is brought in a district court of the United States...*

29 U.S.C. § 1132(e) (emphasis added); *see also* 29 U.S.C. § 1144 (setting forth general preemption over “any and all State laws” that “relate to any employee benefit plan”); *Neumann v. AT & T Commc'ns, Inc.*, 376 F.3d 773, 779 (8th Cir. 2004) (“Claims arising under the civil enforcement provision of Section 502(a) of ERISA, 29 U.S.C. § 1132(a), including a claim to recover benefits or enforce rights under the terms of an ERISA plan, implicate... complete preemption.”).

29 U.S.C. § 1132(e) clearly preempts state court adjudication of IBEW’s claim. The plain language of 29 U.S.C. §1132(e) provides “district courts of the United States... have exclusive jurisdiction of civil actions under [29 U.S.C. §1132].” (Emphasis Added). 29 U.S.C. §1132(e) confers “concurrent jurisdiction” to state courts only for actions under 29 U.S.C. §1132(a)(1)(B) and 29 U.S.C. §1132(a)(7). However, IBEW sought recovery, in a state court, pursuant to 29 U.S.C. § 1132(a)(3). Notably, IBEW’s Complaint repeatedly references 29 U.S.C. § 1132(a)(3) but does not reference 29 U.S.C. §1132(a)(1)(B) or 29 U.S.C. §1132(a)(7). Because IBEW sought recovery in state court on a cause of action other than 29 U.S.C. §1132(a)(1)(B) and 29 U.S.C. §1132(a)(7), the trial court lacked subject matter jurisdiction. As a result, IBEW’s judgment is void.

**C. Because the Trial Court lacked jurisdiction, the Trial Court erred by failing to dismiss.**

“When a court lacks subject matter jurisdiction in a case, dismissal is the only permissible action the court may take.” *Young*, 149 Wn.2d at 133; *see also* CR 12(h)(3) (“Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.”). In *In re Marriage of McDermott*, 175 Wn. App. 467, 479, 307 P.3d 717 (2013), Division I of this Court explained:

Because the absence of subject matter jurisdiction is a defense that can never be waived, judgments entered by courts acting without subject matter jurisdiction must be vacated even if neither party initially objected to the court's exercise of subject matter jurisdiction and even if the controversy was settled years prior.

(Emphasis added); *see also* *Cole v. Harveyland, LLC*, 163 Wn. App. 199, 205, 258 P.3d 70 (2011) (“A judgment entered by a court that lacks subject matter jurisdiction is void.”).

IBEW brought the underlying cause of action pursuant to “29 U.S.C. § 1132(a)(3)” in state court. CP at 2, 4. As explained above, ERISA preempts the Pierce County Superior Court’s authority to hear and decide IBEW’s claim. Because the Trial Court lacked subject matter jurisdiction to enter IBEW’s default judgment, the judgment is void. And further, because the trial court lacked subject matter jurisdiction, “dismissal [was] the only permissible action the court [could] take.”

*Young*, 149 Wn.2d at 133. Accordingly, the trial court erred by failing to dismiss IBEW's Complaint predicated upon ERISA.

**D. IBEW failed to state a common law cause of action for fraud.**

Below, IBEW sought to save its Complaint alleging the Complaint set forth a state law fraud cause of action. As explained above, even if IBEW successfully alleged a claim of fraud; the federal district court, as pled under 29 U.S.C. § 1132(a)(3), held exclusive subject matter jurisdiction. Nevertheless, a review of IBEW's complaint on the whole reflects IBEW did not allege a common law claim for fraud. Instead, the Complaint failed to provide fair notice to Appellants that IBEW sought to pursue a state law based fraud claim rather than ERISA claim.

Washington follows notice pleading rules. *Champagne v. Thurston Cnty.*, 163 Wn.2d 69, 84, 178 P.3d 936 (2008). Notice pleading "requires a concise statement of the claim and the relief sought." *Champagne*, 163 Wn.2d at 84. A complaint is "insufficient" if the complaint fails to give the opposing fair notice of the claim asserted. *Pac. Nw. Shooting Park Ass'n v. City of Sequim*, 158 Wn.2d 342, 352, 144 P.3d 276 (2006). "A party who does not plead a cause of action or theory of recovery cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Dewey v. Tacoma Sch. Dist. No. 10*, 95 Wn. App. 18, 26, 974 P.2d 847 (1999).

Washington law requires a plaintiff that alleges fraud meet heightened pleading requirements. CR 9(b). “CR 9(b) requires dismissal when a complaint fails to plead fraud with particularity.” *Haberman v. Washington Pub. Power Supply Sys.*, 109 Wn.2d 107, 165, 744 P.2d 1032 (1987) *amended*, 109 Wn.2d 107, 750 P.2d 254 (1988). “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” CR 9(b). The plaintiff must plead both the elements and the circumstances of the fraudulent conduct. *Haberman*, 109 Wn.2d at 165. To determine whether a plaintiff sufficiently pled fraud, a court only considers the allegations in the complaint “and not additional allegations made in the briefs.” *Haberman*, 109 Wn.2d at 165.

In this case, a holistic review of the Complaint reflects IBEW did not allege a state based fraud claim. IBEW did not plead with particularity, plead venue and jurisdiction under state law, plead fraudulent conduct occurred, or prayed for relief as allowed by a fraud claim.

1. *IBEW failed to satisfy the notice standard requirement for pleading fraud and did not satisfy Civil Rule 9(b).*

Here, IBEW failed to plead a common law claim for fraud generally.

The nine fraud elements are: (1) a representation of an existing fact; (2) the fact is material; (3) the fact is false; (4) the defendant knew the fact was false or was ignorant of its truth; (5) the defendant intended the plaintiff to act on the

fact; (6) the plaintiff did not know the fact was false; (7) the plaintiff relied on the truth of the fact; (8) the plaintiff had a right to rely on it; and (9) the plaintiff had damages.

*Baddeley v. Seek*, 138 Wn. App. 333, 338-39, 156 P.3d 959 (2007).

As explained above, IBEW's complaint alleged one "Cause of Action" pursuant to ERISA. CP at 4. IBEW alleged, "The above actions of the Defendants rise to the level of fraud and/or serious wrongdoing and thus give rise to a restitution claim under 29 U.S.C. § 1132(a)(3)." *Id.* (Emphasis Added). Moreover, the Complaint alleges the Appellants' conduct resulted "in a prohibited transaction as defined by § 406 ERISA, 29 U.S.C. [sic] § 1106." *Id.* at 3. Thus, IBEW's Complaint clearly sought recovery pursuant to "29 U.S.C. § 1132(a)(3)" and not a common law fraud claim.

IBEW's Complaint wholly fails to provide fair notice of a fraud claim generally or the underlying actions giving rise to a fraud claim. Looking only to the Complaint as *Haberman*, 109 Wn.2d at 165, commands, IBEW's Complaint fails to allege the nine (9) elements of fraud and the Appellant's conduct that satisfies those elements.

As an initial matter, review of the Complaint in the light most favorable to IBEW reveals, at best, the Complaint only alleges Rutherford misrepresented the Appellants' marital relationship. CP at 2 ("DONALD RUTHERFORD... also enrolled Defendant, ROBERTA CRAWFORD,

alleging they were married...”). The Complaint fails to allege any misrepresentation generally by Crawford. Accordingly, the Complaint fails to allege a cause of action for common law fraud against Crawford.

Moreover, assuming, *arguendo*, the Complaint does allege Rutherford misrepresented his and Crawford’s domestic relationship; the Complaint wholly fails to address the remaining elements of a fraud claim.

The Complaint fails to otherwise allege the materiality of the misrepresentation. The Complaint alleges the plan provides benefits to “legal spouses” but also “domestic partners.”<sup>1</sup> CP at 2. Moreover, the Complaint fails to allege: (1) Rutherford intended IBEW to act upon the assertion that he and Crawford were married; (2) IBEW did not know he and Crawford were not married; and most glaring (3) IBEW held the right to rely upon the allegation that Rutherford and Crawford were married. Notably, the Complaint alleges IBEW conducts a “dependent verification process.” CP at 2. However, the Complaint also alleges IBEW only learned of Rutherford’s alleged misrepresentation ten years after the alleged misrepresentation. CP at 2.

Here, IBEW sought to “...finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along,” which *Dewey, supra*, expressly prohibits. Upon reviewing its Complaint, it is

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<sup>1</sup> IBEW also extended benefits to Ms. Crawford with the knowledge Mr. Rutherford and Ms. Crawford were not married prior to filing suit. CP at 68.

clear that, at the time it initiated suit, IBEW did not into to or otherwise set forth a common law claim for fraud.

2. IBEW's Complaint alleges subject matter jurisdiction and venue pursuant to 29 U.S.C. § 1132 and not Washington law.

Further, the Complaint alleged venue and subject matter jurisdiction pursuant to ERISA, not State law. Thus, again, the Complaint fails to give the Appellants fair notice of the purported common law fraud claim asserted. The Complaint reads:

- 2.1 This Court has jurisdiction under §502(a)(3) of the Employee Retirement Income Security Act ("ERISA"), codified at 29 U.S.C. §1132(a)(3).
- 2.2 Venue in this Court is proper under §502(e)(2), ERISA, codified at 29 U.S.C. §1132(e)(2).

CP at 2.

29 U.S.C. §1132(a)(3) reads:

A civil action may be brought—

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

And further, 29 U.S.C. §1132(e)(2) reads:

(e) Jurisdiction

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach

took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(Emphasis added).

Appellants respectfully submit, had IBEW pled a common law state claim, IBEW would allege venue and jurisdiction pursuant to Washington law – not ERISA’s preemption statutes. As explained above, 29 U.S.C. § 1132(e) generally deprives state courts of jurisdiction. And further, 29 U.S.C. § 1132(e) only contemplates venue where an action “is brought in a district court of the United States.” Thus, on its face, the Complaint, if read to allege a state common law cause of action for fraud, sought to invoke State jurisdiction by way of federal preemption statutes. To clarify, Appellants do not contend the Trial Court lacked subject matter jurisdiction to adjudicate a fraud claim; rather, Appellants suggest a review of the Complaint in its entirety reflects IBEW did not allege a common law fraud claim.

3. IBEW’s Complaint reads so that it does not allege fraud.

Moreover, IBEW’s Complaint reads so that it does not allege fraud. Specifically, IBEW’s complaint alleges, Appellants actions “rise to the level of fraud and/or serious wrongdoing and thus give rise to a restitution claim under 29 U.S.C. § 1132(a)(3).” CP at 4 (emphasis added). And further, the Complaint alleges the gravitas of grievance arises because the “Defendants wrongfully engaged and participated in a

prohibited transaction as defined” by ERISA. CP at 3. As a matter of syntax, the Complaint alleges the Appellants either committed fraud or they committed some other “serious wrongdoing” which gives rise to a cause of action under 29 U.S.C. § 1132(a)(3). Thus, as pled, IBEW’s complaint apparently states a cause of action under federal law, not a state claim for common law fraud. Nevertheless, as written, the Complaint also, by use of “and/or” suggests the Appellants may have only committed wrongdoing but not fraud. IBEW did not plead with particularity; instead, it pled ambiguously and failed to provide notice of the common law fraud claim against the Appellants.

4. IBEW’s prayer for relief requested fees pursuant to contract, not common law.

IBEW’s allegation that it pled a cause of action for fraud does not comply with its relief requested. In its complaint, IBEW sought recovery of fees “pursuant to contract and ERISA.” CP at 4 (emphasis added). Again, IBEW’s complaint referenced recovery pursuant to a cause of action other than fraud – namely breach of contract or ERISA.

In summary, the Complaint fails to allege the elements of fraud while a holistic review of the Complaint leads one to believe IBEW sought relief pursuant to ERISA rather than common law fraud claim.

**E. The Statute of Limitations precludes IBEW's recovery in part.**

In the alternative, the Trial Court also erred by failing to dismiss claims barred by the statute of limitations. ERISA does not provide a statute of limitations for actions under 29 U.S.C. § 1132. *Med. Mut. of Ohio v. k. Amalia Enterprises Inc.*, 548 F.3d 383, 390 (6th Cir. 2008); *Wise v. Verizon Commc'ns. Inc.*, 600 F.3d 1180, 1184 (9th Cir. 2010). Instead, federal district courts apply the state statute of limitations most analogous to the ERISA benefits-recovery action. *Wise*, 600 F.3d at 1184; *Med. Mut. Of Ohio.*, 548 F.3d at 390. Though state law provides the applicable statute of limitations, federal law controls when the cause of action accrued. *Wise*, 600 F.3d at 1188. A cause of action under ERISA begins to accrue when a plaintiff knows or has reason to know of the basis of the action. *Pisciotta v. Teledyne Indus., Inc.*, 91 F.3d 1326, 1332 (9th Cir. 1996).

In *Wise*, the Ninth Circuit held RCW 4.16.040 applied to a benefits recovery action brought by a beneficiary pursuant to 29 U.S.C. § 1132(a)(1)(B). *Wise*, 600 F.3d at 1187; *see also First Maryland Leasecorp v. Rothstein*, 72 Wn. App. 278, 282, 864 P.2d 17 (1993) (RCW 4.16.080(4), three year limitations on fraud actions when plaintiff discovers, “or by reasonable diligence, would have discovered, the cause of action”).

In *Medicinal Mutual*, the Sixth Circuit addressed a plan's action against a beneficiary for allegedly misrepresenting eligibility for benefits under 29 U.S.C. § 1132(a)(3). *Med. Mut. of Ohio*, 548 F.3d at 387. The Sixth Circuit applied the federal discovery rule: "a claim accrues (and the statute of limitations begins to run) when the plaintiff discovers, or in the exercise of due diligence should have discovered, the injury which forms the basis for his claim." *Med. Mut. of Ohio*, 548 F.3d at 387. The Court continued:

In the context of fraud, we have imposed upon the plaintiff a positive duty to use diligence in discovering the existence of a cause of action. We have also held that information sufficient to alert a reasonable person to the possibility of wrongdoing gives rise to a party's *duty to inquire* into the matter with due diligence.

*Med. Mut. of Ohio*, 548 F.3d at 391 (quotations and citations removed). The Sixth Circuit recognized the plan "had access to information" that showed the beneficiary's ineligibility, at which time the statute of limitations began to run. *Med. Mut. of Ohio*, 548 F.3d at 391. Thus, the Sixth Circuit rejected the plan's argument that actual discovery during its audit one year before filing to recover benefits was when the statute of limitations began to run. *Med. Mut. of Ohio*, 548 F.3d at 392.

Here, the time for which IBEW could bring its claim lapsed entirely. Substantive Washington law governs the statute of limitations for purposes of filing an ERISA action though the federal discovery rule

applies. Applying a six year statute of limitations, IBEW “had access to [the] information” that it later used to deny benefits for Crawford. As explained in *Medical Mutual of Ohio*, when IBEW apparently conducted its first audit – more than ten years after Ms. Crawford enrolled – does not control.<sup>2</sup> Thus, IBEW cannot recover, much less recover for a period longer than six years.

Further, the same analysis applies should IBEW argue it alleged a common law fraud claim. RCW 4.16.080(4), and its three-year statute of limitations to a common law fraud claims begins to run upon discovery or when the plaintiff with reasonable diligence should have discovered the fraud.<sup>3</sup> IBEW admits it discovered the Appellants’ marital status in 2012 during its, apparently first exercise of due diligence, during the 2012 “dependent verification process.” Accordingly, because IBEW apparently knew or should have known of the Appellants’ marital status three years before bringing this action, RCW 4.16.080(4) limits any recovery now.

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<sup>2</sup> Presumably, IBEW conducted its first audit in 2012, ten years after Ms. Crawford’s enrollment. IBEW’s complaint alleges Ms. Crawford enrolled in June, 2002. CP at 2. The Complaint alleges IBEW uncovered Ms. Crawford’s intelligibility during “the dependent verification process.” *Id.* at 2-3. Thus, if IBEW discontinued Ms. Crawford’s coverage upon discovery, IBEW conducted the “dependent verification process” in 2012.

<sup>3</sup> Again, IBEW’s attempt to recover for approximately six years of benefits, tracks with an ERISA claim. This prayer for relief reflects IBEW sought to recover pursuant to ERISA rather than a common law fraud claim.

F. **IBEW sought recovery of attorneys' fees pursuant to 11 U.S.C. § 1132(g), yet the statute does not permit an award for a default judgment.**

IBEW may not recover attorneys' fees as pled. In its May 15, 2014 Declaration in Support Re Attorney's Fees and Costs, IBEW *solely* plead ERISA §502(g)(1) (codified at 29 U.S.C. § 1132(g)(1)) as the basis for its fee and cost award.<sup>4</sup> CP at 38. However, an award of attorneys' fees under ERISA requires "success on the merits" not merely a procedural victory like the default judgment IBEW obtained.

29 U.S.C. § 1132(g)(1) provides: "In any action under this subchapter [other than actions on behalf of the plan under 29 U.S.C. § 1145, ERISA § 515 dealing with employer contributions to a multi-employer plan], the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

The United States Supreme Court addressed the application of 29 U.S.C. § 1132 (g)(1), ERISA's attorney fee provision, in *Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 255, 130 S. Ct. 2149, 176 L. Ed. 2d 998 (2010). The Court opined:

[A] fees claimant must show some degree of success on the merits before a court may award attorney's fees under § 1132(g)(1)[]. A claimant does not satisfy that requirement

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<sup>4</sup> As indicated prior, IBEW's prosecution of the claim as an ERISA action, including recovery of fees pursuant to ERISA, reflects IBEW considered and treated the claim as a claim pursuant to ERISA, not a common law fraud claim.

by achieving trivial success on the merits or a purely procedural victor[y], but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a lengthy inquir[y] into the question whether a particular party's success was substantial or occurred on a central issue.

*Hardt*, 560 U.S. at 255 (quotations and citations omitted). The *Hardt* Court did not define “some success on the merits” because the claimant there achieved more than a procedural victory. *Hardt*, 560 U.S. at 256. There, the district court denied the claimant’s summary judgment, yet instructed the plan to review the claimant’s application, which resulted in coverage for the claimant. *Hardt*, 560 U.S. at 248-49.

A default judgment is not a judgment on the merits. *See United States v. Signed Pers. Check No. 730 of Yubran S. Mesle*, 615 F.3d 1085, 1091 (9th Cir. 2010) (stating preference to decide cases “on the merits” rather than “judgment by default”); *Morin v. Burris*, 160 Wn.2d 745, 749, 161 P.3d 956 (2007) (Supreme Court favors “resolution of cases on their merits over default judgments”).

As explained above, IBEW’s sought to recover attorneys’ fees pursuant to ERISA. CP at 4, 38. Yet 29 U.S.C. § 1132 (g)(1) does not permit IBEW to recover fees and costs here. IBEW obtained a default judgment, which is a trivial success not on the merits.

Moreover, IBEW’s default judgment wholly contrasts the facts presented in *Hardt, supra*. The claimant in *Hardt* brought a contested

motion for summary judgment and the trial court, though denied relief, ordered action that ultimately granted the relief requested. By contrast, IBEW only brought an uncontested motion for default. Moreover, the trial court did not order any action by the Appellants, the opposing party. And further, the “central issue” – whether 29 U.S.C. § 1132(a)(3) permits recovery by IBEW – remains unresolved. Accordingly, IBEW did not obtain a judgment on the merits and cannot recover fees pursuant to 29 U.S.C. § 1132(g)(1).

**G. Appellants request fees and costs on appeal.**

Appellants respectfully request fees and costs on appeal. As explained throughout, IBEW pled a claim for relief pursuant to ERISA. However, IBEW sought relief in state court rather than federal court which holds exclusive jurisdiction over the 29 U.S.C. § 1132(a)(3) claim brought by IBEW. As an ERISA governed plan and claim, Appellants request fees pursuant to 29 U.S.C. § 1132(g)(1).

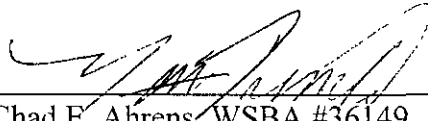
Here, the “central issue” of litigation is whether the Pierce County Superior Court held jurisdiction. Respectfully, reversal on this ground, and dismissal of IBEW’s claim generally operates as a success on the merits after evaluation of IBEW’s Complaint and the facts here.

**VI. CONCLUSION**

Respectfully, this Court should reverse the trial court's entry of judgment against the Appellants and order dismissal of IBEW's complaint for the reasons discussed herein.

DATED this 24 day of June, 2016.

SMITH ALLING, P.S.

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Court of Appeals No. 48627-0-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

---

DONALD RUTHERFORD, an individual and  
ROBERTA CRAWFORD, an individual,

Appellants,

vs

IBEW HEALTH & WELFARE TRUST OF  
SOUTHWEST WASHINGTON,

Respondent.

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**CERTIFICATE OF SERVICE**

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### CERTIFICATE OF SERVICE

The undersigned hereby declares, under the penalties of perjury of the laws of the State of Washington, as follows:

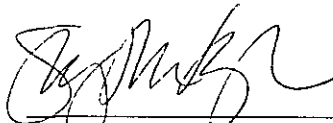
That I am over the age of majority, not a party interested in the above entitled action and competent to be a witness therein.

That on the 24<sup>th</sup> day of June, 2016, I both emailed and mailed and by depositing in the United States mail at Tacoma, Washington, postage pre-paid, a properly addressed envelope containing a true and correct copy of the Brief of Appellants to the following at their respective address:

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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY ML  
DEPUTY

Dated at Tacoma, Washington, this 24<sup>th</sup> day of June, 2016.



Shelly Marie Magdaro, Legal Assistant